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April 28, 2008

VIA ELECTRONIC MAIL

B. Michael Verne  
Premerger Notification Office  
Bureau of Competition  
Federal Trade Commission  
7th & Pennsylvania Avenue, NW  
Washington, DC 20580

Re: HSR Treatment of Franchise Buy-out

Dear Mike:

In follow-up to our conversation on April 14, 2008, I am writing to confirm my understanding that the proposed transaction described below is not reportable under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended ("HSR Act").

Proposed Transaction


Company X is in the business of selling, marketing, servicing and distributing equipment. Company X primarily operates through direct sales to customers, although in a few areas of the country Company X has franchise agreements in place for which Company X is the franchisor. Even in areas where franchise agreements are in place, Company X does some direct sales for national accounts based outside that territory but with locations in that territory. The proposed transaction relates to a buy-out by Company X of a franchise that is owned by Franchisee Y.

The proposed transaction is being done pursuant to an asset purchase agreement. Categories of assets to be acquired as set out in the purchase agreement are:

- (a) the franchise agreement between Company X and Franchisee Y, and all rights to market, distribute, sell or provide goods, services or facilities in connection with the franchise agreement;
- (b) inventory of the franchise business;
- (c) vehicles of the franchise business;
- (d) equipment, tools, computers, repair equipment, spare parts, and other items of tangible personal property owned by Franchisee Y for the benefit of the franchise business; and

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(e) customer files, correspondence with customers, account histories, sales literature and promotional or other material pertaining to products sold, marketed or distributed by the franchise business, and other books and records relating to the franchise business.

The overall value of the transaction is in excess of the \$63.1 million HSR size of the transaction test. However, most of the transaction value is attributable to the franchise agreement and related rights to market, distribute, sell or provide goods, services or facilities in connection with the franchise agreement. The fair market value of the assets in categories (b)-(e) above is below \$63.1 million.

Company X does not intend to operate the franchise being acquired from Franchisee Y as an ongoing franchise operation or transfer that franchise to a third party. Rather, Company X intends to replace Franchisee Y's franchise and exclusivity rights with direct company sales efforts, the same format followed by Company X in most parts of the country. Company X will not buy, rent or use Franchisee Y's offices or warehouses. Rather, sales and inventory operations will be absorbed into other Company X establishments. Company X intends to offer employment to some but not all of Franchisee Y's employees, conditioned on the employees meeting Company X's hiring requirements.

#### Conclusions

You confirmed the following:

- (1) The proposed transaction is not HSR reportable;
  - (2) The acquisition by Company X from Franchisee Y of the franchise agreement and related rights to market, distribute, sell or provide goods, services or facilities in connection with the franchise agreement is not covered by the scope of the HSR Act. In this context, where the franchisor is acquiring back a franchise from its own franchisee, you confirmed that this is treated for HSR purposes as the termination of a contract. A termination of a contract is not within the scope of the HSR Act since the HSR Act and related rules only cover acquisitions of assets, voting securities and non-corporate interests, and a contract termination does not fall within any of those categories for HSR purposes. See FTC Informal Staff Opinion 0406001. You specifically confirmed that even though this aspect of the transaction is characterized as an asset acquisition in the purchase agreement it would not be regarded as an asset acquisition for HSR purposes; and
  - (3) Any cancellation or termination of any intellectual property rights that had been granted by Company X to Franchisee Y as a part of the franchise, even if exclusive in some regard, also would not be covered by the scope of the HSR Act for the reasons discussed in the point above.
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Please let me know as soon as possible if you disagree with any of the conclusions discussed above, or if I have misunderstood any aspect of your advice. Thank you for your assistance in this matter.

Sincerely,

*AGREE - M*  
*4/29/08*

